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Locke Lord QuickStudy: Rough Seas Ahead for U.S. Cabotage Law in the Wake of *Loper Bright*?

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Much has already been written about the shockwaves reverberating from the Supreme Court's decision in *Loper Bright Enterprises, et. al. v. Raimondo, Sec. of Comm., et. al.*, No. 22-451, 2024 U.S. LEXIS 2882 (2024). As the magnitude of its potential impacts begin to crystallize, the maritime industry, like many other heavily regulated industries in the U.S., is beginning to take stock of *Loper Bright*'s implications. (See also our related QuickStudy on the impacts of the Loper Bright decision for regulated industries, *Get Into the Ring: The Supreme Court's Loper Bright and Corner Post Rulings Set up Round Upon Round of New Regulatory Challenges*)

Although one hundred and fourteen pages in length, the *Loper Bright* opinion, at its essence boils down to a relatively straightforward holding: it overrules the long-established doctrine in administrative law commonly referred to as "*Chevron* deference." For the last four decades, attorneys working in any field where federal regulations hold sway have grappled with the doctrine that has emerged following the Supreme Court's decision in *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 47 U.S. 837 (1984). *Loper Bright* overruled the *Chevron* decision, holding "the Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous." Under *Chevron*, courts applied a two-step analysis to the review of agency action. Initially the court was to "discern whether Congress had directly spoken to the precise question at issue." If Congress's intent was clear, this signaled the end of the inquiry and any contrary agency action was rejected. Where a statute was silent or ambiguous, however, the reviewing court was to defer to the relevant agency's interpretation of the statutory language if the agency had offered a "permissible construction of the statute." *Loper Bright* curtails this two-step approach, instead holding that courts were exclusively delegated the responsibility to interpret statutes first by the Constitution and subsequently by the Administrative Procedure Act. The significance of this decision cannot be overstated for those in regulated industries. In essence, the Supreme Court has determined that courts are best tasked with interpreting the laws that enable the federal government's administrative agency actions, without giving deference to the agencies' views on the gray areas with which they wrestle on a daily basis.

The rolling back of *Chevron* has important implications for many industries in the U.S., and the maritime industry is no exception. Given the breadth of what could be considered a "maritime" activity, perhaps it should come as no surprise that the industry is regulated by a number of different federal agencies in different sectors of the federal government. The U.S. Coast Guard ("USCG"), the Maritime Administration ("MARAD"), Customs and Border Protection ("CBP"), the Federal Maritime Commission (the "FMC"), and the Bureau of Safety and Environmental

Enforcement (“BSEE”), among others, are charged with varying degrees of regulatory oversight for maritime matters, each of which could be meaningfully affected by the *Loper Bright* decision.

Citizenship Determinations

Take for example the potential impacts on U.S. citizenship determinations for vessels seeking citizenship and coastwise endorsements to operate in U.S. waters. The Merchant Marine Act of 1920, and Section 27 thereof in particular (commonly referred to as the “Jones Act”)[1], sets forth the requirements for vessels to establish U.S. citizenship and to qualify for the coastwise trade. In broad brush strokes (and here’s where *Chevron* deference has long played a role), the Jones Act requires that a vessel be U.S.-built, U.S.-crewed, and seventy-five percent U.S.-owned in order to qualify to operate in the U.S. coastwise trade (e.g. transporting merchandise between two coastwise points in the U.S.).

As an initial consideration, the USCG is tasked with making U.S.-build determinations, which today rely on the application of nuanced regulatory interpretations of the Jones Act, including setting permissible foreign component thresholds to avoid disqualifying a vessel from a U.S.-build determination, interpreting gaps in statutory limits on non-citizen crewmembers, and conducting detailed analyses for U.S. ownership qualifications. While the statutory language appears straightforward, in practice nearly every key term under the Jones Act has a well-developed body of interpretive doctrine. Indeed, the terms “built,” “owned,” “crewed,” “transport,” “merchandise,” “between,” “coastwise points,” and “in the United States” have all been the subject of agency review and interpretation, and the USCG is the gatekeeper for the issuance of all coastwise trade endorsements.

Further, the USCG and MARAD are regularly called upon to review proposed ownership structures and financial arrangements for newbuild vessels seeking U.S.-flag and/or coastwise endorsement, and for the sale and transfer of qualified vessels among owners and operators. The USCG issues determination letters in response to requests seeking confirmation that contemplated ownership structuring mechanisms are compliant with U.S. regulatory requirements. The Jones Act mandates a two-step analysis with respect to ownership of Jones Act qualified vessels: (1) “Documentation Act Citizen” qualification; and (2) beneficial ownership requirements. Generally speaking, in order to meet the Documentation Act Citizen requirements, a corporation seeking to own a Jones Act vessel must: (a) be incorporated under the laws of the United States; (b) its CEO and Chairman of its Board (or other governing body) must be US citizens, and (c) no more than a minority of the directors needed for a quorum of its Board can be non-citizens. Similar rules apply to other corporate structures, including partnerships, joint ventures and trusts, among others. If the Documentation Act Citizen requirements are met, the next step is to assess whether the prospective owning entity will meet the beneficial ownership requirements. Over the years, both USCG and MARAD have developed robust interpretive frameworks to assess the wide variety of proposed corporate structures that come across their desks, developing a body of guidance that has provided guideposts for the U.S. shipbuilding and vessel transaction markets for decades. The USCG also issues determinations regarding whether work performed on coastwise qualified and/or U.S.-flagged vessels complies with statutory limitations on work performed at foreign yards. Arguably, *Loper Bright* could upend this model, leading to significant uncertainty across broad swaths of the industry regarding how to structure transactions to comply with Jones Act citizenship requirements, and potentially lead to a chilling effect on near term newbuilds and vessel financing and M&A transactions.

Coastwise Trade Compliance

For its part, CBP is regularly consulted for ruling letter opinions through its published Customs Bulletins and Decisions, analyzing specific proposed operational fact patterns for Jones Act cabotage law compliance. While CBP letter ruling opinions are not formally binding for anyone other than the applicant, they have grown to carry significant precedential weight in the U.S. maritime industry, serving an advisory purpose for both U.S. and foreign operators. With the emergence of new markets like offshore wind, legal practitioners have seen a material increase in the number of letter ruling requests submitted to CBP for determination of compliance with cabotage and trade laws related to novel maritime operations necessary to construct, operate and maintain offshore wind farms in U.S. waters. Among the recent instances where CBP has been called upon to interpret the Jones Act vis à vis offshore wind development include whether the installation of a monopile creates a point on the seabed; whether the dumping of scour protection creates a point on the seabed; whether subsea power cable installation is treated in the same manner as subsea telecommunication cable; whether dynamically-positioned station-keeping should be treated in the same manner as vessels jacked up on the seabed for purposes of "transportation," whether owner's representatives and protected species observers are characterized as passengers under the Passenger Vessel Services Act[2]; whether subsea power cable installation constitutes dredging under the Foreign Dredging Act[3] and many other similar issues that implicate and draw upon the technical and operational expertise of the staff at CBP. Perhaps even more than the USCG determination letter process, the issuance of letter rulings by CBP constitutes an exercise of CBP's administrative agency expertise in interpreting gaps in the Jones Act, and a system that an entire industry has come to rely on. *Loper Bright*'s rescission of the concept of deference to agency interpretations will likely have ripple effects for years to come for vessel owners and operators attempting to navigate U.S. cabotage law compliance where CBP letter rulings may no longer set the relevant legal standard.

Jones Act Waivers

In addition to their roles in interpreting the applicability of the Jones Act to cabotage operations, CBP and MARAD, in conjunction with the Department of Homeland Security are also tasked with determining whether non-DOD waivers of the Jones Act may be granted in limited circumstances where no Jones Act-qualified vessels are available to fill the relevant need. Requests for waivers are first submitted to CBP, setting forth the basis for the request and articulating arguments for its necessity to the national defense, which is the sole basis upon which a Jones Act waiver can be granted. MARAD often serves as a consulting agency for these waiver requests, assessing and advising on the availability of Jones Act qualified vessels (or the lack thereof) to address the need that is the subject of the waiver request. Always a politically charged issue, requests to waive the Jones Act are rarely met with assent and can only be granted in the limited circumstance of a national defense interest. Not surprisingly, however, what constitutes the "interest of national defense," has been subject to a wide variety of arguments over the years, which have fallen to administrative agencies to resolve. Past waivers have included short-term exceptions to provide fuel and aid following natural disasters, including aid to Puerto Rico following Hurricane Maria in 2017 and for gasoline, diesel and jet fuel to Texas following Hurricanes Harvey and Irma. Outside of this context, waivers are rarely granted. *Loper Bright* could ostensibly remove this national interest analysis from the Departments of Homeland Security and Transportation, which are uniquely positioned to assess vessel availability and national defense interests, and instead replace them with courts as the arbiters of Jones Act waivers.

The dust is just beginning to settle in the wake of the *Loper Bright* decision, but the effects on the U.S. maritime industry are sure to be significant, casting doubt on the long-term viability of the current paradigm under which maritime actors have long ordered their affairs in order to ensure their vessels operate in the U.S. market in

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compliance with the Jones Act. We at Locke Lord are following developments in this space closely and stand ready to help our clients and partners navigate the challenges ahead.

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[1] *See* 46 U.S.C. § 55012(b). Except as otherwise provided in this chapter or chapter 121 of this title, a vessel may not provide any part of the transportation of

merchandise by water, or by land and water, between points in the United States to which the coastwise laws apply, either directly or via a foreign port, unless the vessel –

Is wholly owned by citizens of the United States for purposes of engaging in the coastwise trade; and has been issued a certificate of documentation with a coastwise

endorsement under chapter 121 or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement.

[2] 46 USC § 55103. The "Jones Act" is an umbrella term often used to refer to a collection of U.S. cabotage laws, which include the Passenger Vessel Services Act, the

Foreign Dredging Act, and the Towing Statute, 46 USC § 55111.

[3] 46 USC § 55109.

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